Comments before the Federal Communications Commission in Support of Docket #17-108, the Restoring Internet Freedom NPRM
Submitted by Daniel Oglesby on his own behalf
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I would like to thank the Commission for the opportunity to comment on this rulemaking. I believe that the NPRM presents a clear path forward for restoring the light-touch regulatory framework that fostered the growth of the internet into the important sector it is today. The economic and social impacts of the internet make it too important to constrain with utility-style regulation designed for rotary phones. The Title II classification must be revoked and the regulatory uncertainty caused by the Open Internet Order rectified.

The Restoring Internet Freedom Notice of Proposed Rulemaking requested analysis on a number of issues surrounding "net neutrality" and Title II. I will address selected topics from the NPRM.

Market Competition and Light-Touch Regulation

In paragraph 39, the Commission seeks comment on the effect of using a light-touch regulatory framework since the *Computer Inquiries*. It is my belief that the explosive growth of the internet has resulted from light-touch policies which enabled companies to create and deploy innovative products without asking for permission. Title II regulation was designed for a telephone monopoly content to reap the benefits of its position rather than innovate. Internet companies, including both edge and core providers, exist in a highly competitive environment in which they must constantly improve their products and reduce costs. Those companies that invest in research and deployment of new technologies will gain market share while those that stagnate eventually fail.

The incidents described in the OIO to justify the bright line rules were not part of a broad trend which resulted in ISPs countrywide beginning to use blocking or throttling policies. In fact, in the time since the Telecommunications Act, net neutrality violations have been few and far between and had entirely ceased by the time the 2015 Order was issued. The Madison River case mentioned in the footnotes of the OIO was resolved in 2005.[1] If the economic incentives for blocking were as strong as proponents of Title II claim, it would seem likely that more companies would have adopted the practices rather than ending them voluntarily under a light-touch regime. Widespread use of blocking, throttling, or paid prioritization failed to appear at any time under light-touch.

This is the result of the competitiveness of internet services. Practices which reduce consumer choice and damage the openness of the internet might provide ISPs with short term profits but in the long run competitors with better offerings will succeed. Given the market penetration of mobile internet, competing wireline providers, and satellite broadband the consumer has more choices than ever before.

The Open Internet Order's description of this relationship was inaccurate. The Commission claimed, BIAS providers have "significant bargaining power [...] in terms of a broadband provider's position as gatekeeper—that is, regardless of the competition in the local market for broadband Internet access, once a consumer chooses a broadband provider, that provider has a monopoly on access to the subscriber."[2] The so-called monopoly position an ISP secures once a customer signs a contract lasts only as long as the customer renews service or doesn't have access to other providers. The language used in the Order even seems to confirm that consumers have access to a competitive market when searching for a new ISP. There are transition costs inherent in switching from one ISP to another but if these costs were outweighed by the damage done by blocking and throttling, a rational customer would decide to switch.

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[1] *In the Matter of Protecting and Promoting the Open Internet*, FCC 15-24 (2015), footnote 123.
[2] *In the Matter of Protecting and Promoting the Open Internet*, FCC 15-24 (2015), para. 80.

Paragraph 39 also asks for information on which real harms occurred under light-touch regulation. There were a few isolated incidents of throttling, blocking, or other behavior which could be considered anti-consumer. Up until the FCC's change in policy in 2015, however, these cases could have been handled under Federal Trade Commission jurisdiction. In fact, the FTC was engaged in an enforcement action against AT&T when the OIO was issued, alleging that AT&T was engaged in deceptive practices when the company promised "unlimited" mobile broadband service but throttled subscribers once they reached a certain data limit. The action resulted in a court case against the company in 2014.[3] By 2016, that case had been thrown out on the grounds that the common carrier classification removed AT&T from FTC jurisdiction, hampering legitimate consumer protection. The case will be reviewed *en banc* but the conclusion is far from certain and, absent a legislative solution, the only reliable way to resolve the jurisdictional question is to return BIAS to information service classification. The restoration of light-touch regulation will return real privacy and consumer protection to internet services and end the confusion surrounding their classification.

Paragraph 50 requests information on the effects of industry-wide preemptive regulation if competitive market forces or federal and state regulations already in place before the OIO were preventing net neutrality violations. The regulatory uncertainty caused by the reclassification has caused serious issues with state and federal regulation.[4] State definitions of broadband and common carriers differ as do the specific regulations applied to them. The Open Internet Order preempted state regulators from applying common carrier rules to broadband providers as the FCC forbore rate regulation and extensive oversight of capital deployment and investment. However, given the reclassification of BIAS as a telecommunications service, definitional questions will affect the application of other state regulations.

Existing consumer protections were sufficient to defend against the majority of abuses which would fall under no blocking and no throttling rules. Laws preventing fraud and abuse could be used to enforce contracts which promised "internet access" but limited the websites which could be connected to (blocking). The FTC's case against AT&T was based primarily on the company's contractual obligation to offer unlimited data service and subsequent throttling of internet access on those devices. Consumers are capable of understanding the contracts they sign and, as long as those contracts' integrity is upheld by the consumer protection regulators and the courts, they can determine the appropriate services for their needs.

If preexisting regulations were sufficient, preemptive regulation on top would have no positive effects except to possibly prevent ISPs from even considering such policies. Preemptive regulation also stops any pro-consumer policies which could technically violate the bright line rules. For example, if an ISP prioritizes programs which require low latency or high bandwidth, the policy may violate the no throttling rule.

Even the curtailed version of Title II regulation used in the OIO was sufficiently threatening to create regulatory uncertainty that may lower investment. Short term trends are insufficient to demonstrate the long-term effects of the 2015 rules but I believe that longer-term implementation of the OIO will result in a rate of capital expenditure for network deployment similar to Europe.[5]

In light of the effectiveness of preexisting regulations, broad preemptive measures were unnecessary. If the bright line rules were to be strictly enforced, zero-rating would likely have been found

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[3] *Federal Trade Commission, Plaintiff, v. AT&T Mobility LLC, a limited liability company, Defendant*, FTC MATTER/FILE NUMBER: 122 3253, https://www.ftc.gov/enforcement/cases-proceedings/122-3253/att-mobility-llc-mobile-data-service

[4] See American Legislative Exchange Council's "Comments in Support Proposed Rulemaking In the Matter of Restoring Internet Freedom, WC Docket No. 17-108"

[5] "International Broadband Investment Comparison" United States Telecom Association. Accessed July 15, 2017. https://www.ustelecom.org/broadband-industry-stats/investment/international-comparison.

in violation. Zero-rating is a widely popular practice which creates a real consumer benefit. An edge provider can pay to ensure that end users receive free data when using its services or an ISP can offer certain services free of charge. This is a win-win pro-consumer deal negotiated without coercion of any kind. In the 2015 OIO, the Commission expressed mixed feelings about zero-rating and stated that such plans would be regulated under the Internet Conduct Standard which would presumably give the flexibility needed to exempt providers from the bright line rule concerning paid prioritization.[6]

Strictly applied ex-ante regulation preempts both harmful and beneficial practices. If a combination of preexisting regulations and market forces result in a reliable shield against abuses, the use of bright line rules preempts only pro-consumer practices.

The Internet Conduct Standard

The Internet Conduct Standard (sometimes called the General Conduct Standard) is overly vague and leads to confusion over what the FCC will find to be in violation of the rules. The Commission's "catch-all" provision was designed to enforce net neutrality rules against new violations of the bright line rules. The effect of such broad language is that companies don't know whether something they do is in conformance to the 2015 rules until the FCC begins enforcement action or issues a declaratory ruling.

In paragraph 73 of the NPRM, the Commission raises the question of whether the standard provides "adequate notice of what [companies] are and are not allowed to do." The answer is made evident by Chairman Wheeler's comments following the OIO's passage. In a press conference he concluded that "we don't know" what activities would be banned under the standard.[7] The ambiguity introduced by this provision will dampen innovation as ISPs hedge their bets against uncertainty. Removing the standard will clarify what is and isn't allowed and help providers to better plan investments.

Another section of paragraph 73 asks if the standard benefits consumers in any way. It is plausible that ISPs could devise a policy which harms consumers and the "catch-all" nature of the standard could prevent it from being implemented. Like much of the Title II debate, this policy is premised on a hypothetical danger. Regulation should make clear what is and isn't allowed before companies are expected to comply with it. A company cannot plan for long-term investment or set business practices without a clear understanding of what is permissible. Additional confusion is created by the FCC's use of the rule to exempt certain cases of zero-rating from regulation. It appears that the Internet Conduct Standard was designed to give the Commission extreme flexibility, perhaps to the point of allowing "arbitrary and capricious" actions.[8]

Privacy

The Federal Trade Commission has historically been in charge of enforcing federal privacy laws. FCC Chairman Ajit Pai and FTC Acting Chairman Maureen Ohlhausen have suggested that the FTC should once again lead on ISP privacy regulation.[9] Given the use of the Congressional Review Act to revoke the FCC's privacy rules,[10] this action has become essential.

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[6] *In the Matter of Protecting and Promoting the Open Internet*, FCC 15-24 (2015), paragraphs 151 and 152

[7] "Wheeler on General Conduct Standard." C-SPAN.org. Accessed July 15, 2017. https://www.c-span.org/video/?c4534447/wheeler-general-conduct-standard.

[8] "Review of Agency Decisions" US Courts for the Ninth Circuit. Accessed July 15, 2017. http://cdn.ca9.uscourts.gov/datastore/uploads/guides/stand_of_review/IV_Review_AD.html

[9] "Joint Statement of Acting FTC Chairman Maureen K. Ohlhausen and FCC Chairman Ajit Pai on Protecting Americans' Online Privacy." Federal Trade Commission. March 01, 2017. Accessed July 17, 2017. https://www.ftc.gov/news-events/press-releases/2017/03/joint-statement-acting-ftc-chairman-maureen-k-ohlhausen-fcc.

[10] PUBLIC LAW 115–22 (Government Publishing Office 2017).

The FTC is a stronger privacy watchdog than the FCC. It has decades of experience enforcing data security and privacy rules whereas the FCC only took the lead on ISP privacy in 2015. As with many other aspects of the actions taken by the FCC in 2015, the privacy rules were duplicative of other agencies' efforts and created confusion over jurisdiction and standards.

Support for the Proposed Rules

Given the disruptive nature of the 2015 reclassification, I believe that returning internet service providers to the information service classification is the best option. The light-touch regulations applied to information services allow the consumer-driven innovation which defined the last two decades. A return to permissionless innovation will benefit consumers and businesses alike.

In the case of real harm, consumers have recourse to the robust set of state and federal institutions which protected them before the OIO. Breach of contract or unfair business practices can be redressed in the courts without creating bright line rules that preempt both pro- and anti-consumer business practices.

Heavy-handed utility style regulation, even with significant forbearance, is inappropriate for internet access services. The competitiveness of the market and limited incentives for blocking and throttling makes Title II regulation unnecessary.